



A.S.(MD)No.134 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 17.08.2023

PRONOUNCED ON: **01.02.2024**

CORAM:

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
AND
THE HONOURABLE **MR.JUSTICE R.VIJAYAKUMAR**

A.S.(MD)No.134 of 2013
and
M.P.(MD)No.1 of 2013 & C.M.P.(MD)No.10501 of 2022

Sasikala

...Appellant

/Vs./

M.Selvaraj

...Respondent

PRAYER:- Appeal Suit - filed under Section 96 with Order 41 Rule 1 of CPC, to set aside the judgment and decree dated 22.04.2013 in O.S.No. 81 of 2012 on the file of the Principal District Judge, Tiruchirappalli and allow this appeal with the costs.

For Appellant : Mr.H.Lakshmi Shankar

For Respondent : Mr.I.Vel Pradeep



A.S.(MD)No.134 of 2013

WEB COPY

JUDGMENT

(Judgment of the Court was made by **DR.ANITA SUMANTH, J.**)

The appellant was the plaintiff in O.S.No.81 of 2012 filed seeking relief of partition and separate possession of her half share in the properties at New Ward – D, Block No.40, T.S.No.153, Old Municipal Ward No.2, Block No.39, T.S.No.210 Vamadam Palla Street, Thennur, Trichirapalli (in short ‘suit property’) by metes and bounds.

2. The submissions of the appellant represented by Mr.H.Lakshmi Shankar are as follows. The parties had been married on 30.08.1990 and the appellant had secured employment in the passport office in 1993. The suit property had been purchased on 10.12.1997 under document No.3750 of 1997. The registration of the document was admittedly in the name of the defendant only and it is the appellant’s case that she had contributed equally towards the cost of the same.

3. The couple had commenced construction of the house in the property in 1998, for which purpose, they had jointly availed a housing



A.S.(MD)No.134 of 2013

loan from HDFC Bank, Trichy. The appellant had submitted that she had availed personal loans from Life Insurance Corporation of India, State Bank of India, Trichy Branch, Bank of India and a jewellery loan from TDCC Bank, Main Branch, Trichy apart from liquidating fixed deposits held by her in TDCC bank, Gandhi Market Branch, Trichy. She would also claim that her family, i.e., her father and brother had contributed towards the cost of construction of the suit property.

4. The personal relationship between the parties deteriorated as a result that the appellant filed HMOP No.215 of 2010 seeking dissolution of marriage before the Principal Sub Judge, Trichy. The respondent had submitted to the decree and hence their marriage had been dissolved on 07.01.2012. Being of the categorical view that her contribution towards the suit property was more than 50%, the appellant issued a legal notice on 06.04.2012 seeking partition of the suit property into two equal shares and allocation of one share to her by metes and bounds.



A.S.(MD)No.134 of 2013

WEB COPY

5. The response from the respondent was adverse, negating her rights in toto. The appellant would aver that the respondent is well aware of her legitimate claim over the property, since she had put forth such averments even during the proceedings before the Family Court which had never been objected to by him. She drew specific attention to a diary maintained by the respondent and certain entries therein as well as a letter written by him to her confirming the factum of her contributions.

6. The appellant had marked 13 documents, being Certified copy of sale deed bearing document No.3750 of 1997 dated 10.12.1997 – Ex.A.1; HDFC Bank loan documents – Ex.A.2; Savings Bank Pass book in the name of appellant (TCC Bank) – Ex.A.3; Copy of petition filed in HMOP.215/10 – Ex.A.4; Certified Xerox copy of decretal order in HMOP.215/10 dated 07.01.2012 – Ex.A.5; Lawyer's notice dated 06.04.2012 – Ex.A.6; Reply notice dated 25.04.2012– Ex.A.7; Savings Bank passbook (Bank of India) – Ex.A.8. Diary maintained by respondent – Ex.A.9. Letter written by respondent to the appellant dated 14.02.2007 – Ex.A.10. Note book containing details of accounts – Ex.A.



A.S.(MD)No.134 of 2013

WEB COPY

11. Pay slip of the appellant – Ex.A.12. Xerox copy of Canara bank passbook in the name of the respondent – Ex.A.13.

7. She had entered the box as P.W.1 and had examined 5 witnesses – P.Ws. 2 to 6 being, V.Vetriselvan – Employee of TDCC Bank, E.Selvaraj – Assistant Manager of State Bank of India Main Branch, Gilda – Administrative Officer of LIC of India, N.Rajkumar – Manager of City Cooperative Bank, Gandhi Market Branch and B.P.YG. – Manager, Bank of India, Pannankombu Branch.

8. For his part, the respondent denied any contribution of the appellant insisting that the suit property had been purchased out of his own savings and loans. He pointed out that her income was meagre and did not even serve to meet her own personal expenses. He denied that the housing loan had been availed jointly stating that it was the respondent who had availed the loan with one Mathivanan signing as a guarantor. All repayments had been made out of his own monthly salary. He also denied that there had been any contributions by the appellant's family.



A.S.(MD)No.134 of 2013

9. The couple had have two children and in fact, it was the respondent who had been maintaining the family including the children during the subsistence of the marriage. He pointed out that the appellant had purchased a flat in a building called Prestige apartments for Rs.18.00 lakhs in 2011 and thus, it is entirely untrue to expect that she would have had any amount over and above the cost of that flat to have contributed to the acquisition of the suit property.

10. The respondent had marked 16 documents, being his pay particulars – Ex.B.1; Appointment order of the appellant dated 13.05.1993 in the passport office as a Lower Division Clerk – Ex.B.2; Memorandum issued by Prasar Bharati issued to the respondent granting permission for construction of house dated 12.11.1998 – Ex.B.3; Thrift Society member pass book of the respondent – Ex.B.4; Housing loan sanction order for the respondent dated 27.06.2001 – Ex.B.5; Loan pass book in the name of respondent (Bank of Baroda) – Ex.B.6; Loan discharge certificate issued by Bank of Baroda – Ex.B.7; Canara Bank Savings Bank pass book of the defendant – Ex.B.8; Canara Bank



A.S.(MD)No.134 of 2013

account closing certificate – Ex.B.9; Savings Bank pass book in the name of respondent (SBI) – Ex.B.10; Estimated cost for the proposed construction – Ex.B.11; Estimated cost for first floor construction – Ex.B.12. Notice dated 14.12.2012 under Section 6 of RTI Act sent by respondent's counsel to the AEO, Primary Educations – Ex.B.13; Acknowledgment card of the aforesaid reply – Ex.B.14. Reply received under RTI Act dated 10.01.2013– Ex.B.15 and Xerox copy of sale deed in the name of appellant dated 09.02.2011– Ex.B.16.

11. He had entered the box as D.W.1 and had examined 6 witnesses as D.Ws. 2 to 7 being Christi Gnanavaram- Senior Clerk, All India Radio Station, Tiruchirappalli, Ethiraj- Senior Manager, Bank of Baroda, Thillai Nagar Branch, Karuppiah - Senior Manager, Canara Bank, Cantonment Branch, Vinoth - Assistant Manager, State Bank of India Main Branch, S. Ganesh - Assistant, Passport Office and Kanagasabapathy – Administrative Officer (Incharge), All India Radio Cooperative Society.



A.S.(MD)No.134 of 2013

12. The witnesses have marked 17 documents, being Xerox copy of receipts for jewel pledged by the appellant dated 19.07.2006 and 08.02.2007 – Exs.X.1 and X.2; letter from State Bank of India to the Court dated 13.12.2012 – Ex.X.3. Savings Bank pass book in the name of appellant in State Bank of India – Ex.X.4. Status report of LIC policy – Ex.X.5. Loan taken by the appellant in TCC Bank dated 02.01.2013 – Ex.X.6. Details of GPF withdrawal of the respondent – Ex.X.10. Housing loan details sanctioned to the respondent by Bank of Baroda dated 27.06.2001 – Ex.X.11. Certificate of loan liquidation by Bank of Baroda dated 13.02.2013 – Ex.X.12. Statement of accounts given by Canara Bank for the loan received by the respondent – Ex.X.13. Loan application form of the respondent – Ex.X.14. Letters from the Passport Officer, Tiruchy forwarding the loan application of the appellant to the Secretary of the Central Government Co-operative Thrift and Credit Society Ltd., dated 08.09.2009 – Ex.X.15. Details of loan availed by respondent in the Society – Ex.X.17. Details of Service and pay details of plaintiff, loan of appellant – Ex.X.19 (Series) and Ex.X.20.

13. The issue framed by the trial Court was whether the



A.S.(MD)No.134 of 2013

appellant was entitled to the half share in the suit property or any relief at all. The Principal District Judge, Tiruchirappalli considered the facts, evidences as well as the decisions cited by the appellant in the cases of *Dr.N.G.Dastane V. Mrs.S.Dastane*¹ and *R.Venkatesa Konar V. Ryhenna B*² and the decision cited by the respondent in the case of *S.Elangovan V. Sembian and others*³

14. He was of the view that the appellant had been employed only from 1993 and till 1997, and the maximum salary that she had earned was a sum of Rs.2,990/- per month. The respondent however was an Engineer drawing a net pay of Rs.17,483/- in March, 2007 as per the pay slip marked. Even assuming that the appellant had handed over her entire earnings to the respondent, her earnings were too low to constitute an equal contribution.

15. As far as the loans are concerned, it was the respondent who had availed a loan of Rs.80,000/- for purchase of the plot and thus there was no record available, according to the learned Judge, to

¹ 89 Law Weekly 110

² AIR 1990 Madras 196

³ 2020 (2) TLNJ 398 (civil)



A.S.(MD)No.134 of 2013

establish the position that the appellant had contributed anything at all, even towards the purchase of the plot.

16. He also concluded that the construction had been carried out by the respondent by raising loans from his GPF account and banks and thus the suit property enured fully and absolutely to the respondent only. It is as against the aforesaid judgment that the present appeal has been filed.

17. Before us, the same arguments as advanced before the Trial Court have been reiterated. A cash flow statement has additionally been filed at the request of the Court, to indicate, at one glance, the annual salary of both the parties from 1993-94 to 2007-2008 which was the duration of their life together. The cash flow statement reads thus:

Salaries of Appellant and Respondent between the period 1993-1994 to 2007-2008:-

Years	Sasikala Salary (Annually)	Total	Selvaraj Salary (Annually)	Total
1993 – 1994	Rs.22,428/-		Rs.73,200/- (*approx.)	
1994 – 1995	Rs.23,428/-		Rs75,600/- (*approx.)	



A.S.(MD)No.134 of 2013

WEB COPY

1995	—	Rs.20,688/-		Rs.78,000/-	
1996				(*approx.)	
1996	—	Rs.46,956/-		Rs.80,400/-	
1997					
1997	—	Rs.47,004/-	1,60,504/- A	Rs.82,800/-	3,90,000/- A
1998					
1998	—	Rs.51,060/-		Rs.85,200/-	
1999					
1999	—	Rs.51,060/-		Rs.87,600/-	
2000					
2000	—	Rs.53,388/-		Rs.87,600/-	
2001					
*2001	—	Rs.54,384/-	370396/- B	Rs.87,600/-	7,38,000/- B
2002					
*2002	—	Rs.69,876/-		Rs.95,000/-	
2003					
*2003	—	Rs.76,068/-		Rs.1,00,000/-	
2004					
*2004	—	Rs.80,904/-		Rs.1,20,000/-	
2005					
2005	—	Rs.82,704/-		Rs.1,38,000/-	
2006				(*approx.)	
2006	—	Rs.78,528/-		Rs. 1,65,527 /-	
2007				(*approx.)	
2007	—	Rs.95,412/-	8,53,888/- C	Rs. 1,68,593 /-	15,25,120/- C
2008				(*approx.)	

* The tabulation furnished by the appellant contained blanks as regards the annual salary of Selvaraj/respondent for the years 2001-02, 2002-03, 2003-04 and 2004-05. Learned counsel for the appellant states that those particulars were not available with the appellant. There is nothing to show that there was any interruption in the employment of the respondent for those 4 years. Hence, solely in the interest of the statement reflecting the proper position as to the total earnings from salary of the respondent as well (since the annual salary particulars of the appellant have been furnished for all years between 1993-94 and 2007-08), we have presumed the salary for the four years 2001-02 to 2004-05 as set out in the tabulation above providing for escalation similar to increase in the salary of the appellant for those very years.

A copy of the above cash flow statement has been supplied to



A.S.(MD)No.134 of 2013

the learned counsel for the respondent as well and no dispute is raised in regard to the figures set out therein.

18. Mr.Vel Pradeep, learned counsel who appears for the respondent submits that the suit property is self-acquired and rightly stands thus in the name of the respondent alone. The entire consideration has been paid by the respondent and there has been no contribution whatsoever by the appellant.

19. As far as the submission in relation to the diary, the respondent would argue that pages have been taken selectively, merely to present certain random entries which are really not of much significance. Had the earlier and latter pages been retained, instead of being torn away, he would state that an entirely different picture of things would have emerged. However, he has nothing specific to state as far the entries in the diary or the contents of the letter are concerned.

20. He would also argue that the burden of proof to establish that the appellant has, in fact, made any payments towards consideration for



A.S.(MD)No.134 of 2013

purchase of suit property falls on her and she has not discharged that burden in the least. The relationship between the appellant and the respondent had been acrimonious and this is supported by the fact that the parties had to approach the Family Court for a resolution.

21. Heard learned counsel and perused the brief. The two admitted factual positions in the matter concern (i) the date of purchase of plot, which was on 10.12.1997 for an amount of Rs.68,000/- and (ii) the period of house construction, which was between 1998 and 2001 for an amount of approximately Rs.8.00 lakhs.

22. The availability of resources as on those points in time has been ascertained and marked as A and B in the tabulation at paragraph No.17. The salary earnings in entirety, of the appellant and respondent during 1993 and 2008 are Rs.8,53,888/- and Rs.15,25,120/- (approx.) respectively.

23. That apart, there are two important pieces of evidence that merit consideration - the diary maintained by the respondent indicating



A.S.(MD)No.134 of 2013

the source and deployment of cash, marked as Ex.A.9 and a letter written by the respondent to the appellant on 14.02.2007, marked as Ex..A 10.

The dairy and letter read as follows:

Ex.A9 - DIARY

19 December –

யுவராஜ் அனுப்பியதில் எடுத்துக்கொண்டது	50,000
20/12 அன்று மாமனார் கொடுத்தது	10,000
முதன்முதலில் மாமனார் கொடுத்தது	25,000
மாமியார் கொடுத்தது	5,000
	90,000
8/7 அன்று திருப்பிக் கொடுத்தது	- 50,000
	40,000

20 December வரவு செலவு மொத்த விபரம்

	நகை வைத்தது	21000.00
	GPF காக எடுத்தது	- 3200.00
		17800.00
	மாமா கொண்டு வந்தது	+ 25000.00
		42800.00
	சிமென்ட்+ 1 மூட்டை 175+8850	- 9025.00
		33775.00
	4/9 வரை 3 லோடு செங்கல் + 2 லோடு மணல் கொடுத்தது	- 12300.00
		21475.00
	4/9 வரை மேஸ்தரி கொடுத்தது	- 3890.00
		17585.00



A.S.(MD)No.134 of 2013

WEB COPY

5/9	லிண்டில் கட்ட வாங்கியது + கொண்டு வந்தது 8615+100	-8715.00
		8870.00
	எலக்ட்ரிகல் பைப் வயரிங் மாற்றுதல் பைப் வாங்கியது புதுபடிக்கு அஸ்திவாரம், கருங்கல் வாங்கியது கொண்டு வந்தது மற்றும் பழைய கட்டிடம் இடிக்க 300+385+115+100+300+100	-1300.00
		7570.00
5/9	வரை எலக்ட்ரிகல் ஜாமான் 50+25+30	- 105.00
		7465.00
8/9		-1550.00
		5915.00

21 December

		5915.00
8/9	அன்று HDFC க்கு	- 1000.00
		4915.00
8/9	அன்று சென்ட்ரிங்காரருக்கு மேஸ்திரி மூலம்	-2000.00
		2915.00
8/9	அன்று சசி பேங்கில் எடுத்தது	+8000.00
		10915.00
31/8	அன்றைய செல்வராஜ் சம்பளம் 7300-4500=2800	+2800.00
		13715.00
8/9	செல்வத்திற்கு கைமாத்தாக கொடுத்தது	-2500.00
		11215.00
14/9	அன்று கிரில் ஓர்க் அட்வான்ஸ்	-2000.00
		9215.00
14/9	அன்று கம்பி.வேலை அட்வான்ஸ்	-1500.00
		7715.00
14/9	அன்று PFC பைப் மற்றும் ஜாமான்கள்	-150.00
		7565.00
13/9	அன்று 3kg கட்டுக் கம்பி	-71.00

15/53



A.S.(MD)No.134 of 2013

WEB COPY

		7494.00
15/9	அன்று சீட்டு பணம் (பாலன்)	-1000.00
		6494.00
16/9	அன்று மேஸ்திரி அட்வான்ஸ்	-5000.00
		1494.00
15/9	அன்று சசி மூலம் பேங்க் லோன்	+49500.00
		50994.00
16/9	வரை $\frac{3}{4}$ ஜல்லி, மணல், செங்கல் ஆகியவற்றிற்கு கணக்கு பார்த்து முடித்த தொகை	-16100.00
		34894.00

22 December

		34894.00
16/9	அன்று சென்ட்ரிங்காரருக்கு அட்வான்ஸ்	- 1500.00
		33394.00
16/9	அன்று 6 மூட்டை சிமென்ட்	- 1075.00
		32319.00
16/9	சில்லரையில் வாங்கியது 4 மூட்டை சிமென்ட்	- 440.00
		31879.00
	பேங்க் லோன் வாங்க ஆனசெலவு	- 1000.00
		30879.00
16/9	சசி பிரோவில் போட்டது	- 100.00
		30779.00
18/9	எலக்ட்ரிக் கல் பைப், GI பைப் மற்றும் சிலாப்புகள் $830+295=$	-1125.00
		29654.00
18/9	அன்று கம்பி வாங்கியது + வாடகை $11095+130$	-11225.00
		18429.00
18/9	அன்று 1 மூட்டை சிமென்ட்	-110.00
		18319.00
20/9	அன்று சென்ட்ரிங்காரருக்கு அட்வான்ஸ்	-1500.00
		16819.00

16/53



A.S.(MD)No.134 of 2013

WEB COPY

21/9	சிமென்ட் 60 மூட்டை	-10260.00
		6559.00
21/9	சசி GPF வாங்கியது	+10000.00
		16559.00

23 December

		16559.00
23/9	அன்று சிமென்ட் மூட்டை	- 220.00
		16339.00
23/9	அன்று கம்பி வாங்கியது	- 2498.00
		13841.00
24/9	அன்று மேஸ்திரிக்கு 5000+1000 சென்ட்ரிங்காரருக்கு)	- 6000.00
		7841.00
24/9	அன்று செல்வம் கொடுத்தது	+ 2000.00
		9841.00
24/9	சாப்பாடு செலவு, கம்பி கொண்டு வந்தது வாடகை 500+100	- 600.00
		9241.00
24/9	மெயின் வாடகை மற்றும் கொண்டு வந்த செலவு	-745.00
		8496.00
25/9	வரை பெட்ரோல் மற்றும் இதர செலவுகள்	-1896.00
	Balance on 25/9 at 22.00 hrs	6600.00

Ex.A-10 - LETTER

நான் வாங்கிய சம்பளத்தை தெரிவிக்காதது தவறுதான். இதனால் நான் பட்ட சந்தோசங்கள் என்று நீ நினைப்பது சரியல்ல. கஷ்டங்கள் தெரியக்கூடாது என்பதற்காகத்தான். உனக்கு பிரச்சனை ஆரம்பிக்கும்போதே எனக்கும் ஆரம்பித்துவிட்டது என்றுதான் சொல்லவேண்டும். ஏதோ தப்பித்தேன் என்று தான் சொல்லவேண்டும். அவர் 1,50,000/- அனுப்பியதால்

17/53



A.S.(MD)No.134 of 2013

WEB CO

தப்பித்தேன். இல்லையேல் பல வகையில் மாட்டிக்கொண்டு இருப்பேன் இன்னும் 75,000/- தரவேண்டும். இதற்காக நான் பல முயற்சிகள் எடுத்துள்ளேன். கண்டிப்பாக கிடைக்கும் என்ற நம்பிக்கை உள்ளது. இரண்டு பேங்கிற்கும் இன்னும் கட்டவேண்டியது அவ்வளவுதான் இருக்கும். அடுத்த ஆண்டு பிறக்கும் போது பிரச்சனை முடித்துவிடும் என்று நினைக்கிறேன். பல ஆண்டுகள் கஷ்டப்பட்டாலும் அதிக கஷ்டப்பட்டதைத்தான் தெரிவிக்கிறேன். இது நான் போய் மாட்டிக்கொண்டதால் தான். ஆனால் நீ நான் சந்தோசமாக இருக்கிறேனா? இல்லையா? என்பதற்காகத்தான் தெரிவிக்கிறேன். தப்புசெய்து தற்பொழுது தெரிவிப்பதற்கு மன்னிக்கவும். xerox காப்பியில் எல்லா விபரமும் உள்ளது இருந்தாலும் நான் வாங்கிய சம்பளம் மட்டும் தனியாக எழுதுகிறேன் இதை வைத்து எப்படி குடும்பம் நடத்தி இருப்பேன் என்பதன் அறியவே விபரமாக சம்பளத்தை மட்டும் எழுதுகிறேன்.

30.5.04 முதல் 30.11.05 வரை 18 மாதம் HDFCக்கு cheque கொடுத்து கட்டியது மாதம் 1733/-

5.4.05 முதல் அவர் வீட்டிற்கு வாங்கிய கடனுக்கும் Canara Bank Loan

வீடு கட்டியது முதல் இன்றுவரை வீட்டுக்கடனுக்கு EMI 5200/-

12/02/05 முதல் அவர் வீட்டிற்காக BARODA Bank Loan EMI 2600/-

ஆக மொத்த EMI 1733+3230+5200+2600=12763/-

மாதாமாதம் நான் கட்டிய தொகை 12763/- இதற்கு மேல்தான் வீட்டு

செலவு etc.,

கனரா பேங்க் அக்கவுண்ட் ஓப்பன் செய்த நாள் 24.12.04

28.02.05 மாதம் தான் பேங்கிற்கு முதன் முதலில் சம்பளம் போனது. இதன் பிறகு பேங்கிற்கு போன சம்பளம் விபரம்.

28.02.05	-	8859.00	(வருமானவரி போக)
5.4.05	-	11417.00	(மார்ச் மாத சம்பளம்)
30.04.05	-	12222.00	
1.6.05	-	12241.00	
30.6.05	-	12015.00	
30.7.05	-	11982.00	
31.8.05	-	11982.00	
28.09.05	-	12893.00	
31.10.05	-	12590.00	
30.11.05	-	12654.00	
30.12.05	-	12316.00	
31.1.06	-	12070.00	
28.2.06	-	12215.00	
3.4.06	-	12296.00	(மார்ச் மாத சம்பளம்)
28.4.06	-	14087.00	
31.5.06	-	13452.00	
31.6.06	-	13512.00	



A.S.(MD)No.134 of 2013

31.7.06	-	13478.00
30.8.06	-	13492.00
28.9.06	-	14204.00
31.10.06	-	14461.00
30.11.06	-	13463.00
29.12.06	-	13425.00
31.1.07	-	12538.00
28.2.07	-	12504.00
4.4.07	-	13865.00 (மார்ச் மாத சம்பளம்)
30.4.07	-	15160.00
31.5.07	-	15119.00
29.06.07	-	15181.00

கொடைக்கானல் சம்பளம்: SBI Bank

இதை வைத்துக்கொண்டு எப்படி சமாளித்து இருப்பேன் என்பதனை தெரிந்துகொண்டால் போதும். கஷ்டத்தை தெரிந்தால் வருத்தப்படுவாய் என்பதால் தெரிவிக்கவில்லை. நீ வருவதற்குள் (திருச்சிக்கு) கொடுத்துவிடுவார் என்று நினைத்தால் வந்த விளைவுதான் இந்த கஷ்டம். மண்ணிக்கவும்.

sd.xxx

28.9.07	-	14860.00
31.10.07	-	14445.00
30.11.07	-	14445.00

சொசைட்டி லோன்போக மீதம் தான் பேங்கிற்கு போகும். சொசைட்டிக் கடன் முடியும் தருவாயில் உள்ளது.

24. The entries in the diary are on 19th to the 23rd of December.

Though the year is not available on the pages of diary, the entries are themselves relatable to specific dates in July, September and December.

The entries refer to purchases of materials and the sources of money for the purchases. The extracts of pages and the entries therein are not per se disputed by the respondent either before us or in trial. The only defence is their selective presentation as evidence.



A.S.(MD)No.134 of 2013

25. Though only a few pages have been presented to us, those pages do contain entries highlighted in bold that establish that contributions have been made by the appellant (named as Sasi). These entries would serve well the submissions of the appellant that she has contributed to the purchase of the suit property and militate against the opposing submission of the respondent in this regard.

26. That apart, neither the pages of the diaries nor the entries have been disputed by the respondent. Since they are diaries maintained by him, he could well have produced the same to establish that they do not come to the aid of the appellant, if seen wholistically. However, he has chosen not to. He has also not chosen to elaborate on what material the earlier and subsequent pages could possibly contain that could lead to disbelieving or negating the entries relating to the appellant's contributions.

27. In such circumstances, the diaries (extracts) and the entries therein persuade us to conclude that the appellant has, indeed, made contributions towards purchase/construction of suit property. Though the



A.S.(MD)No.134 of 2013

evidences as above posit that there have been contributions made by the Appellant, unfortunately, these evidences have escaped the attention of the learned Judge who has not adverted to the same.

28. There are entries very clearly to the effect that contributions have been made by the appellant. There is a reference to a loan taken by the appellant and contributions made by her father. The Tamil term for father-in-law is ‘*மாமனா*’, which is used at one instance. Subsequently, the term ‘*மாமா*’ is used. We are not aware as to whether the two words refer to the same person or two different individuals, as the latter is, in common parlance, also used interchangeably with the former to denote a father-in-law.

29. Thus, while the exact quantum of contributions will be unascertainable, the factum of the appellant having made contributions is very clear. That apart, in the letter, the respondent himself conceded to the fact that he had not disclosed his salary fully to the appellant. The relevance that this would have on the present case is that the entirety of the respondent’s salary has not been channeled towards common



A.S.(MD)No.134 of 2013

purpose, ie., the purchase of plot and the construction of the house and had been utilized for other purposes as well.

30. This would support the categoric impression we have that there are contributions of the appellant, both towards purchase of the land as well as cost of construction. Though there may be a disparity in the amounts, such disparity is not, in our view, as important as the fact that it is the combined effort and contribution of the couple that has resulted in the acquisition of the asset. That apart, the numbers in the tabulation also indicate the sufficiency of resources in the hands of the appellant as well to have met the expenditure towards purchase and cost of construction.

31. There is a slew of case law on how the ownership of properties acquired out of common funds is to be understood in the context of Section 45 of the Transfer of Property Act, 1882 (in short ‘T.P.Act’).

32. Section 45 reads as follows:

“Where immovable property is transferred for consideration to two or more parsons, and such



A.S.(MD)No.134 of 2013

consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced. In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property”.

33. In *C.V.Ramaswami Naidu and ors. V. C.S.Shyamala Devi and ors*⁴, the parties were brothers. A suit had been filed by one of the brothers seeking partition and separate possession of his share in the suit schedule properties. He also sought a decree directing the first defendant to pay to him half share of the investments made and called upon him to render a true and correct account of the rental income derived by the defendants from all the properties.

34. In that context, the Division Bench states as follows:

4 (1978) 1 MLJ 505



‘Co-ownership is a relationship which springs and slopes from consensus and contract. Legislation has only imprinted on the concept of co-ownership certain rights which have a supervening effect which are declaratory of the rights inter se as between co-owners. The legal relationship is always knitted in a framework of jointness and no one therein can predicate with certainty as to what portion of the property held in common is his; and an element of inseparability is inhered in the doctrine of co-ownership. What can be predicated by reason of [Section 45](#) of the Transfer of Property Act and by invoking the principle of quasi trust in the [Indian Trusts Act](#) is the quantum of rights of such co-owners in the entirety of the property. Such quantification of rights of each of the co-owners in a given property depends on the facts and circumstances of each case. It is for the purpose of providing a just rule for weighing and appreciating the value or interest of a co-owner in joint property that the rule of equity is evolved in [Section 45](#) of the Transfer of Property Act’.

35. Thus, if the source for purchase or investment in a joint enterprise emanates from a common fund, the share of each of the co-owners would be equal to their interest in the common fund. However, in a situation where there is no evidence available as to the specific individual interest to which the parties entitled, then it shall be presumed that such persons are equally interested in the property.

36. The fact that the property was purchased in the name of one of



A.S.(MD)No.134 of 2013

the co-owners would not make a serious dent on the role of '*rule of good conscience*', which is the basis for Section 45 of the T.P. Act. On facts, the Court found that the acquisition of that suit property was made by joint effort and that income accrued from all the brothers had gone into a common pool. It would not possible to forensically split the consideration qua each individual and hence by application of Section 45 of the T.P. Act, the Court held that the plaintiff was entitled to a half share in the suit properties.

37. The ingredients that are necessary to be proved in order to attract the rule of good conscience set out under Section 45 are i) there should be a common fund; ii) there must be contributions to the common fund whose contributions are admitted; iii) such contributions might either be specifically ascertainable or otherwise, but the factum of contribution must be admitted; iv) the quantum of contribution must not be lopsided, though there may be absence of specific details of the contributions made by the parties.

38. It is this rule of justice, equity and good conscience which



A.S.(MD)No.134 of 2013

the Division Bench in the case of *C.V.Ramaswami Naidu* states is reiterated in the Indian Trusts Act dealing with quasi trusts. The Division Bench accedes to the accepted notions under the Indian Trusts Act that are inextricably connected with the doctrine of co-ownership in the case of partition as well.

39. They conclude that one brother who had purchased the property in his name but with the common fund earned by the exertions of himself and his brothers could not set up an exclusive title in himself, such as to ward off just and equitable claims of the other brothers in the suit property.

40. The judgment in *C.V.Ramaswami Naidu* (supra) has been referred to and followed in several later decisions. The respondent cites the decision in *Dayanand Rajan and another V. Ram Lal Khattar*⁵, wherein the conclusion is adverse to those appellants. In the case of *Dayanand Rajan* (supra), there is a categoric finding of fact that the plaintiff had been only 18 years when the suit plot had been purchased and no documentary proof had been filed with regard to any contribution

⁵ 2018 3 AD(Del) 511



A.S.(MD)No.134 of 2013

by him towards the purchase of the property. It was in that factual scenario that the appeals had been dismissed.

41. In *Gannmani Anasuya and others V. Parvatini amarendra Chowdhary and others*⁶, there was a joint venture between the parties. One side had sought partition of a Poultry business being run by the other group of persons. In deciding that issue, the Court reiterated that the conduct of parties was very important. When in cross-examination a witness accepted the correctness of a document, that document would assume importance in deciding the issues arising in the suit.

42. That principle is pressed into service in the present case to state that the diary and the letter written by the respondent to the appellant, were never denied at any stage of the trial and we find this averment to be factually correct.

43. In *Mohan Lal V. Board of Revenue, U.P., Allahabad and others*⁷, a Writ Petition had been filed arising out of a suit under Section 138/176 of the U.P.Zamindari Abolition and Land Reforms Act, where the plaintiff's father claimed half share in a property. In that case, there

⁶ (2007) 10 SCC 296

⁷ AIR 1982 All 273



A.S.(MD)No.134 of 2013

had been recital in the sale deed indicating the plaintiff's share as 1/21.

That recital had been relied upon by the respondents to state that the terms of sale deed could not be faulted as it represented the agreement of the parties.

44. The Court noticed that the dispute in the matter had not been between the vendor and the vendee, but inter se the vendees itself and hence the question of varying of the contract terms did not arise. The actual dispute related to the allocation of shares of the vendees in the disputed property and the decision of their claim based on the recital in the sale deed was found to be incorrect.

45. In arriving at this conclusion, the Court relied upon the judgment of the Hon'ble Supreme Court in the case of *R. Vishwanathan V. Rukn-ul-Mukh Syed Abdul Wajid*⁸ to following effect:

".....Evidently, the recitals in the release deed were made for maintaining a record thaqt Devraj and Ramalinga had no interest in the property of Shanmugan. Admissibility of evidence to contradict the recital that there was in fact no property of the joint family is not precluded by S. 92, Evidence Act, as the dispute in this suit does not arise between the parties to the documents,

8 AIR 1963 SC 1



A.S.(MD)No.134 of 2013

but between persons who claimed under Ramalingam who was the executants of the document.”

46. Several Countries follow the community property system, the origin of which are mired in antiquity. It appears that society was far more equitable in ancient times and the community property system developed by virtue of the desire to provide for the support of the wife, on the one hand and as a curb to a husband's despotic power, on the other.

47. Marital community existed in ancient times in Egypt, Greece and Babylonia. In the Twelve Tables of Gortyn, Article 3 provides as follows:

‘ The Twelve Tables of Gortyn, 2 L.Q. Rev. 136, 144 (1886): “3 of the Code provides that, If a man and woman separate, she shall have her own things which she had when she went to the man, and the half of the fruit, if it be from her own goods, and the (part) whatever it be (of) whatever she has woven, and five stators, if the man be the cause of the divorce; but if the man should say..... the judge shall decide on oath’ (c.450 to 350 BC.).’

48. There is literature to suggest that the Grecian code of Gortyn and the Code of Hammurabi, promulgated in Babylonia may well



A.S.(MD)No.134 of 2013

be the basis of the modern European community systems providing for community of property between spouses.

49. In the United States as well, as on date, more than 9 states provide for ownership of property on common community basis. In the Soviet Union, a limited form of the community of property based on the principle of equity and emancipation was introduced for the first time in 1926 in replacement of the separate property regime. The common goal of these regimes was to ensure an economic protection of the weaker spouses, unanimously accepted to be the woman, in case of divorce or termination of marriages.

50. There are differences in different parts of the Europe on how the community property system works and the system followed is not uniform throughout. While some places follow a common community system of property, some follow a system of deferred community of property and some, a limited community of property.

51. The Netherlands follows an unique system which is the universal community of property connoting a complete joinder of



A.S.(MD)No.134 of 2013

property from the moment of solemnization of the marriage by operation of law. Courts in England thus apply the law as aforesaid apportioning the property on common community basis.

52. In *Cooke V. Head*⁹ an unmarried couple acquired a property by their joint efforts and for their joint benefit. The land had been acquired by the man in his name for the purpose of building a bungalow for himself and his mistress to set up a home together. The lady had not contributed to the consideration itself, but had helped in the physical exertion of building a bungalow and contributing to the mortgage instalments and other excesses.

53. The couple had separated thereafter and the property had been sold. The Courts held that the man had held the property on trust for both himself and his mistress beneficially. Thus, the joint efforts of the couple for the acquisition of the property for joint benefit would result in them sharing the property equally.

54. In *Macdonald V. Macdonald*¹⁰ a couple had sold a cottage and out of the proceeds the lady had contributed funds for the purchase of

⁹ (1972) 2 All E.R. 38

¹⁰ ([1957] 2 All.E.R.690)



A.S.(MD)No.134 of 2013

another dwelling house. That house was bought in the name of the husband, who mortgaged it in order to raise the rest of the purchase price. The furniture was also provided by the wife and her mother.

55. Ultimately, it was held that the husband, wife and the wife's mother, each held beneficial interest in the house as it had been purchased as a joint family enterprise. Since no precise calculation of their interests was possible, they should be regarded as being entitled beneficially in equal shares.

56. In *Bull V. Bull*¹¹, the plaintiff and his mother, who was a defendant in the suit purchased a freehold house. Admittedly, the plaintiff had contributed a larger part of the consideration and the property was purchased in his name. The parties occupied the house together, though the defendant had restricted her occupation to two rooms alone while the plaintiff had occupied the remainder of the house.

57. When differences arose, the plaintiff had brought the action for possession of the rooms occupied by the defendant. That action for possession was rejected on the ground that the effect of the purchase was

¹¹ ([1955]1 All.E.R. 253)



A.S.(MD)No.134 of 2013

that both parties became beneficial tenants in common of the proceeds of the sale of the property.

58. Worldwide, there are on-going discussions and new trends in concepts of marital property and jurisdictions are looking to find ways and means of adopting the method that best suits that society. It is high time that such discussion takes place in India. (India follows the separate property regime, where, in the event of termination of marriage, spouses would be entitled to those assets to which they claim ownership based on their respective contributions in that regard and establishing the same in a manner known to law).

59. In *Mohd. Habib s/o Mohd. Ishaque V. Abdul Aziz and others*¹², the plaintiff had purchased the suit property in 1957 by way of a registered sale deed. The registered deed was in possession of the scribe and the vendor who was interested in the defendants, surreptitiously added the names of the defendants in the sale deed as purchasers along with the plaintiff. The defendants had been minors and had not, in the course of the trial established their contribution of even a single paise

¹² 2008 (4) Mh.L.J.509



A.S.(MD)No.134 of 2013

towards consideration. The plaintiff did not know about the aforesaid sequence of events. Only at a later point in time, when the plaintiff asked the defendants to vacate the premises where he had allowed them to stay, did they claim title themselves.

60. The plaintiff was unsuccessful before two Courts. Before the High Court, Section 45 was invoked at the instance of the respondents, but the Court held that the provision had no application, since there was no evidence of any contribution at all by the defendants to the purchase of the suit property.

61. Section 45 comprises of two parts. The first states that parties are entitled to interest in a property identical, as nearly as may be, with the interests to which they are respectively entitled in the fund. This would apply in a case where contributions are ascertainable. The second part of Section 45 states that where there is no evidence as to their interest in the fund, such persons would be presumed to be equally interested in the property.

62. In the present case, firstly, a cash flow statement has been filed



A.S.(MD)No.134 of 2013

by the appellant, which has been admitted by the respondent as well.

That sets out the salary incomes of the appellant and the respondent over the relevant point in time (see paragraph No.17 of this order). However, the letter filed in Ex.A.10, reveals that the entirety of the respondent's salary did not go towards purchase of the property. Secondly, the couple had two children and somebody had to meet their expenses. There is no evidence that has been produced by either of them as to who bore which portion of those expenses.

63. Thirdly, both parties have availed housing loans and jewel loans, which is admitted, and emanates from the impugned judgment, wherein the learned Principal District Judge has referred to the bank officials produced as witnesses who have spoken to the loans taken by both of them. The relevant portion of the judgment evidencing the loans taken by the appellant reads thus:

7 The employee of TDCC bank has been examined as P.W.2 and he has given evidence that on 19.7.2006 the plaintiff obtained jewel loan of Rs. 31000/-and the said loan was repaid on 20.6.2007 and again she obtained jewel loan on 8.2.2007 of Rs.45,000/- and it was repaid on 8.2.2008. The relevant documents have been marked as Ex X1 and X.2. The



A.S.(MD)No.134 of 2013

WEB COPY

Assistant Manager of State Bank of India main branch has been examined as P.W.3 and he has stated that the plaintiff has obtained personal loan of Rs.25,000/-on 28.7.2000 and the said loan was discharged on 7.7.2002. He has also stated that the relevant documents have been destroyed due to efflux of time. He has marked the certificate to that effect as Ex. X.3 and the extract of relevant entries in their ledger as Ex. X.4

8 The plaintiff has examined the Administrative Officer of LIC of India as PW4 She has given evidence that the plaintiff has obtained loan of Rs. 28,500/ against policy from their company on 8.2.2008 and the loan is still pending. Ex.X.5 is the certificate issued by the LIC of India. The Manager of the City Co-operative Bank, Gandhi Market branch has given evidence as P.W.5 that the plaintiff obtained jewel loan of Rs. 5,000/- on 23.2.2001 and another loan of Rs 14,000/-on 12.2.2002 and the loans were discharged. The loan account details have been marked as Ex. X.6. The Manager of Bank of India, Pannankombu branch has been examined as P.W.6 and he has given evidence that the relevant loan records have been destroyed. Ex. X.7 is the certificate that the documents were destroyed and Ex. X.8 is the summon received by P.W.6. He has also stated that Ex A.8 passbook was issued by their bank to the plaintiff Sasikala and as per the entries in the passbook Rs.50,000/- loan was granted to Sasikala and that if the entire loan was discharged the documents will be destroyed and if there is balance towards the loan transaction the documents will not be destroyed. From his evidence we could understand that since the relevant documents were destroyed it shows that the loan has been repaid.

9 The evidence of P.W.2 would reveal that the plaintiff obtained jewel loans during the years 2006 and 2007 and the said loans were repaid within one year of borrowing. As per



A.S.(MD)No.134 of 2013

the evidence of P.W.3 the plaintiff obtained personal loan of Rs 25,000/-in the year 2000 and it was repaid in July 2002. The plaintiff also borrowed jewel loans from City Co-operative bank in the years 2001 and 2002 and those loans were discharged. As per the evidence of P.W.6 the plaintiff obtained Rs. 50,000/- loan from Bank of India and that loan also was discharged. The specific case of the plaintiff is that she was earning from the year 1993 and up to June 1997 she has given all her earnings to the defendant and utilizing her income also the vacant site has been purchased in the year 1997 and thereafter also the plaintiff has given all her earnings to the defendant and she has also obtained loans from various banks and the amounts were also given to the defendant. Though the loans were obtained by the plaintiff the said loans were repaid within one year of borrowing. It shows that the loan amounts received and given to the defendant, as contended by the plaintiff, were repaid by the defendant himself. Ex.A.1 loan document reveals that the plaintiff and defendant were shown as the borrowers of the loan.

64. Fourthly, the extracts from the diary, admittedly, maintained by the respondent itself indicate that there were some contributions made by the appellant and her father. She is entitled to credit on this aspect as well. These four parameters would establish clearly and undeniably that the appellant has contributed towards common pool from which the land was purchased and the house constructed.

65. No forensic audit is possible in the absence of specific



A.S.(MD)No.134 of 2013

materials being furnished by the respective parties as to a precise determination of who has contributed how much towards purchase/construction cost. Thus, this is the case where Section 45 is applicable on all fours, particularly the second limb thereof.

66. In *Dr.Gurmukh Ram Madan V. Bhagwan Das Madan*¹³ relied on by the respondent, admittedly, the title deed, as in the present case, stood in the name of the respondent alone. However, that is only one factor to be taken into consideration, as, at paragraph 6 of the judgment, there are findings of the Court to show that no material was placed to evidence joint funds.

67. The Bench finds categorically that there had been no evidence to show that the appellant had contributed any sums of money in the purchase of the house '*either in the shape of a documentary or oral evidence, except his own self-serving statement which are self-contradictory*'. The Court states that '*as to whether the property was joint family property or whether he had contributed any funds towards purchase of the plot are principally in the region of appreciation of*

¹³ Air 1998 SC 2776



A.S.(MD)No.134 of 2013

evidence'. Since there had been no credible evidence produced, they concluded against the appellant.

68. In the present case, there has been evidence, both by way of the testimony of the bank officials to show that the appellant had taken loans, extracts from the respondent's diary, where he himself records her contribution as well as the fact that the appellant had independent resources of her own to lead us to a conclusion that she had made positive contributions towards purchase of the property and its construction.

69. Assuming for a minute that no portion of her independent resources went towards the purchase and development of the suit property, certainly those amounts would have gone towards the upkeep of the house and education and maintenance of the children. In an appropriate case, where such is the factual situation, due weightage would have to be given to such expenses and efforts to determine the ownership of the individual who has incurred such expenditure/put in



A.S.(MD)No.134 of 2013

such effort.

70. The respondent relies on a decision in the case of *S.Elangovan V. S.Sembian and others*¹⁴, where also, the prayer was for partition. That suit had been decreed, as against which the first defendant had come in appeal which had been allowed. The ratio relied upon by the respondent is that the burden of proof was on the person seeking partition to prove that the property standing in the name of an individual as family property was acquired from and out of the joint efforts of every member of the joint family.

71. The narration in that judgment sets out the trajectory of events in that family on the basis of which the Court has come to a conclusion that the plaintiffs had not discharged the burden on them.

72. In the present case, we have, on a detailed examination of the evidence as well as the omission of the lower court to look into certain critical aspects of the evidence, come to the conclusion that the appellant has, in fact, discharged her burden and the lower Court erred in not noting that she had done so.

¹⁴ 2010 (2) TNLJ 398 (civil)



A.S.(MD)No.134 of 2013

WEB COPY

73. While there is no quarrel on the legal proposition that it is for the parties seeking the benefit, to discharge the burden lying on them to prove evidentially that they are entitled to the benefit they seek, in this case, we categorically believe that the appellant has discharged that burden.

74. An argument is also raised in terms of Section 92 of the Indian Evidence Act, 1872, which reads as follows:

92. Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms.

75. However, the law is settled that even in a case where any matter has been proved by way of a document which then obviates any oral agreement as between the parties to be admitted, there is nothing to forbid any party to that document saying that the transaction was fictitious.



A.S.(MD)No.134 of 2013

WEB COPY

76. In the present case, undoubtedly, the sale deed is in the name of the respondent. However, this does not prevent or preclude the appellant from bringing in evidences as available to her to establish that the sale deed does not represent the true state of facts and that by virtue of her contribution which we believe she has established, she is entitled to her share of property as well. The legal issue is answered in favour of the appellant both for the reasons that the appellant has established the factum of her contributions as well as by application of Section 45 of the T.P.Act.

77. Yet another argument that the respondent has advanced is that, the appellant may, if at all, as only sue for a money claim against the respondent but cannot later claim to the property itself. In this context, he relies on the decision of the Calcutta High Court in *Aliva Banerjee V. Somtirtha Banerjee and others*¹⁵. The Court notes that the parties were estranged and had jointly applied for a loan to acquire a property. It was also admitted that the property acquired jointly in favour of both parties had not been conveyed to the appellant who instituted a partition suit

152018 SCC Online Calcutta 2547



A.S.(MD)No.134 of 2013

claiming her share.

78. The Court records that it was an admitted position that the property had not been conveyed in favour of the appellant and hence while she may have a money claim against her husband and may also seek an order in the nature of an attachment before judgment in respect of that property, since she cannot demonstrate that she is a part owner of such property, partition suit was not maintainable. The order is short and does not take note of several other decisions that have been referred to in the course of this judgment supporting our view that this appeal is liable to be allowed.

79. Respondent would also take a technical plea that a partition suit was not maintainable, since, in effect, the relief sought is for a declaration challenging title deed of the suit property that stands in the name of the respondent. In light of the fact that the document stands in the name of the respondent, relief cannot be sought by the appellant merely by way of a partition suit as what has in effect been sought, is a declaration in disguise as a partition.



A.S.(MD)No.134 of 2013

WEB COPY

80. We are not impressed by either of arguments above as there is a gamut of case law on the subject, where partition has been sought of family properties on the strength of consideration having been drawn from a common pool.

81. In fact the petitioner's submission finds a statutory basis in Section 45 of the T.P. Act. A plethora of decided cases would also stand testimony to the legal position that ownership to property can well be sought if the ingredients of Section 45 are satisfied. That apart, this argument has not been tested before the Trial Judge and no issue has been framed in this regard.

82. Next, learned counsel for the respondent would draw attention to the Tamil Nadu Court Fees and Suit Valuation Act, 1855 (in short 'Court Fees Act') to show that it is only Court fee under Section 37(2) that has been paid, whereas, if the suit was to be taken to be one for declaration, the stipulation as regards Court fee under Section 37(1) would stand attracted.

83. However, no issue has been framed by the lower Court in this



A.S.(MD)No.134 of 2013

regard as well. Had the respondent been of the view that the suit was not maintainable, on account of deficit Court fee paid, such an issue ought to have been raised at the first instance and not at the stage of appeal.

84. Section 37 deals with partition suits and reads thus:

37.Partition suits.- (1) *In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.*

[(2) In a suit for partition and separate possession of joint family property or property owned jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates:-

When the plaint is presented to –

<i>(i) the High Court</i>	<i>Rupees ten thousand</i>
<i>(ii) Courts other than High Court</i>	<i>Rupees five thousand.</i>

85. The appellant has, admittedly, paid Court fee in terms of Section 37(2). The respondent would argue that Section 37(2) is wholly inapplicable, since she is not in joint possession of the property along with the respondent. That may be so and if one were to very technically



A.S.(MD)No.134 of 2013

construe the issue, then she ought to have paid fee only under Section 37(1).

86. However, this issue has not been adverted to at all by the respondent in the course of the first round of litigation. There is no reference to deficit Court fee in the written statement and no issue has been framed.

87. That apart, Section 12 of the Court Fees Act provides for a decision as to proper fee to be paid and states that in every suit instituted in any Court other than the High Court, the Court shall, before ordering the plaint to be registered, decide on the materials and allegations contained in the plaint and in the written statement, if any, and determine the proper fee payable.

88. Such decision is subject to further review and Section 12(2) enables the defendant to, by way of his written statement filed before the first hearing of the suit or before evidence recorded on the merits of the claim but subject to Section 12(3), plead that the subject matter of the suit has not been properly valued or that the fee paid is insufficient.



A.S.(MD)No.134 of 2013

WEB COPY

89. In such a situation, the Court is to decide on such a plea prior to the recording of evidence. Section 12(3) further enables a defendant to plead in the written statement filed, after issues had been framed, that the subject matter of the suit has not been properly valued or that the fee is insufficient. Even in such a case, such an argument of undervaluation or payment of deficit court fee is to be decided prior to evidence having been recorded.

90. The examination of proper and appropriate court fee could thus have been made at three stages, one at the stage of presentation of the plaint at the instance of the Court itself, and the second and third at the instance of the defendant. In the latter scenarios, a defendant may, in the written statement filed at the first instance plead undervaluation/deficit court fee.

91. If he misses the bus at that stage, he may file an additional written statement after framing of issues pleading undervaluation or deficit court fee. Thus, there is ample opportunity available to a defendant to plead the issue of insufficiency of court fee and if such issue



A.S.(MD)No.134 of 2013

is not brought up at these instances and argued for a decision, the defendant runs the risk of losing the opportunity thereafter in this regard. We are of the considered view that the non-raising of the issue of deficit court fee is fatal to the case of the respondent having not been raised at any stage of the trial.

92. Moreover, there is an avenue open to the Appellant by way of sub-section (4) of Section 12, where such an issue may be addressed and remedied even before the Court of appeal. Sub-section (4) reads as follows:

12.Decision as to proper fee in other Courts.- (1).....

.....

(4)(a) Whenever a case comes up before a Court of Appeal, it shall be lawful for the Court, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other proceeding in the lower Court and determine the proper fee payable thereon.

Explanation.- A case shall be deemed to come before a Court of Appeal even if the appeal relates only to a part of the subject-matter of the suit.

(b) If the Court of Appeal decides that the fee paid in the lower Court is not sufficient, the Court shall require the party liable to pay the deficit fee within such time as may be fixed by it.



A.S.(MD)No.134 of 2013

(c) If the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower Court and which the appellant seeks in appeal, the appeal shall be dismissed, but if the default is in respect of a relief which has been decreed by the lower Court, the deficit fee shall be recoverable as if it were an arrear of land revenue.

(d) If the fee paid in the lower Court is in excess, the Court shall direct the refund of the excess to the party who is entitled to it.

93. In the present case, it is only at the stage of appeal that the defendant has raised this issue and we have, supra, found that there is no justification for the belated pleading in this regard and the issue does not warrant an answer. However, the situation calls for remedy in light of our conclusion of the legal issue in favour of the Appellant. The State Treasury need not be a casualty in this regard.

94. We find on the conclusion that we have reached and a proper construction of Section 37 of the Court Fees Act that the present Suit should have been valued and Court fee paid on the market value of the plaintiff's share of the suit property. This has not been done.

95. In *Sridharan and others V. Ammugam and others*¹⁶, at

¹⁶ (1993) 2 MLJ 428



A.S.(MD)No.134 of 2013

paragraph 6 of that judgment and on the admitted evidence that the plaintiffs were not in joint possession, the Court held that they ought to have paid Court fee under Section 37(1) of the Act, relying on the law settled by the Full Bench of this court in *C.R.Ramaswami Ayyangar V. C.S.Rangachariar*¹⁷. There is thus a direction to the appellant to remit the deficit Court fee in terms of Section 12(4)(b) of the Court Fees Act, within a period of six (6) weeks from date of receipt of a copy of the decree.

96. In the course of the hearing, there was some discussion on the application of Benami Transactions (Prohibition) Act, 1988, (in short 'Benami Transaction Act'), particularly Section 4(3)(b). That provision states that where a property is held by a person standing in a fiduciary capacity for the benefit of another person, that would imply ownership of trust or confidence between the trustee and beneficiary and such transaction would be saved from the prohibition under Section 4 of the Benami Transactions Act.

97. In that context, we had had the benefit of the judgments in

¹⁷ ILR 1940 Mad. 259



A.S.(MD)No.134 of 2013

*Mangathai Ammal (died) through legal representatives and others V. Rajeswari and others*¹⁸ *Marcel Martins V. M.Printer and others*¹⁹, *Arun Das V. Aparna Das*²⁰. The Appellant has not taken the specific argument that the property has been bought in the name of the respondent in benami capacity. She avers that it has been purchased in his name despite she having contributed significantly and equally toward the consideration. We thus find no necessity to allude to the cases relating to the Benami Prohibition Act.

98. The respondent in the appeal/defendant had filed C.M.P(MD).No.10501 of 2022 seeking permission of the Court to mark seven documents as additional evidence. The property tax receipts and electricity consumption card cannot confer any exclusive title upon the defendant. All other documents are prior to the filing of the suit. The suit was pending between 2014 to 2019. A perusal of the affidavit does not disclose any acceptable reason for receiving the said additional documents which were not filed during the pendency of trial. Hence, the

18 (2020) 17 SCC 496

19 (2012) 5 SCC 342

20 Manu/TR/0136/2021



A.S.(MD)No.134 of 2013

application for additional evidence stands dismissed.

99. This appeal is allowed. No costs. Connected Miscellaneous
Petitions are closed.

**[A.S.M.J.] & [R.V.J.,]
01.02.2024**

NCC :Yes/No
Index :Yes/No
Internet :Yes
sl

TO

1.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

2.The Principal District Judge,
Tiruchirappalli.



WEB COPY



A.S.(MD)No.134 of 2013

DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

sl

Pre-delivery Judgment made in
A.S.(MD)No.134 of 2013

Dated: 01.02.2024